No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1944

STATE OF NEW YORK AND SARATOGA SPRINGS COMMISSION AND SARATOGA SPRINGS AUTHORITY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 22–26) is reported in 48 F. Supp. 15. The opinion of the Circuit Court of Appeals (R. 33–37) is reported in 140 F. 2d 608.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 23, 1944. (R. 37.). The petition for a writ of certiorari was filed May 12, 1944. The petition was granted

on June 12, 1944. (R. 39.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the State of New York and its agencies are entitled to immunity from the federal excise taxes imposed by Section 615 (a) (5) of the Revenue Act of 1932 in respect of certain mineral and table waters bottled and sold by the agencies.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

> ARTICLE I
>
> SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States:
>
> * * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

> * * * * *
>
> TITLE IV—MANUFACTURERS' EXCISE TAXES
>
> SEC. 615. TAX ON SOFT DRINKS.
>
> (a) There is hereby imposed—
>
> * * * * *
>
> (5) Upon all natural or artificial mineral waters or table waters, whether car-

bonated or not, and all imitations thereof, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 12½ cents per gallon, a tax of 2 cents per gallon.

* * * * *

STATEMENT

This is a suit by the United States to collect taxes, interest and penalties assessed on the bottling for sale and sale in closed containers of natural mineral and table waters at a price in excess of 12½ cents per gallon by the Saratoga Springs Commission and the Saratoga Springs Authority during the period June 21, 1932, to May 10, 1934, inclusive. (R. 9–10.)

The Saratoga Springs Commission (hereinafter referred to as the Commission) is a public commission of the State of New York, which was created in 1930 as a temporary commission for a term of seven years and continued in 1937 as a permanent commission. (R. 10.) The Saratoga Springs Authority (hereinafter referred to as the Authority) is a public benefit corporation of the State created in 1933 to take over the management of a State Reservation at Saratoga Springs (hereinafter referred to as the Reservation) by lease from the Commission. (R. 10.) The Authority was established in order to obtain a loan from the Reconstruction Finance Corporation to aid in the further development of the Reservation

for public health purposes in accordance with the declared policy of the State. (R. 10.)

During the period June 21, 1932, to May 10, 1934, inclusive, the Commission and Authority bottled for sale and sold in closed containers certain natural mineral and spring waters at a price in excess of 12½ cents per gallon to various vendees within and without the State. Returns disclosing the amount of tax payable, if due, on the sales made during this period were filed under protest with the Federal Collector of Internal Revenue at Albany, New York. The returns were filed by the Commission for the period June, 1932, to September, 1933, inclusive, and by the Authority for the period October, 1933, to May, 1934, inclusive. (R. 10–11.) A statement was attached to each return that no tax was due upon the ground that the sale of the waters by the State was the exercise of a governmental function. (R. 11.) The taxes in the amounts disclosed by the returns, together with interest and penalties, were assessed by the Commissioner of Internal Revenue and notices and demands for payment were issued upon the proper parties, but no part thereof has been paid. (R. 11–12.)

The waters, the bottling and sale of which gave rise to the instant controversy, came from mineral springs on the Reservation in the vicinity of Saratoga Springs, New York. The waters are char-

acterized by a supersaturation of carbon dioxide gas, and contain in various quantities and combinations, minerals in solution, the most common of which are salt, soda, calcium, magnesium and iron in the form of chlorides and bicarbonates. (R. 12.) These waters have been drunk and used for bathing purposes by large numbers of people from colonial times. (R. 12.) They have a recognized medical value and are prescribed by physicians both for bathing and internal use. (R. 12.)

Commencing in 1911 the State acquired all of the then existing springs. (R. 13.) Title to all lands from which the springs flowed or spouted was taken and remains in the name of the State. (R. 13.) Jurisdiction over the springs was transferred in 1930 to the newly created Saratoga Springs Commission, the legislature declaring its purpose to be to develop the Reservation as a state health resort and spa for public health purposes. (R. 13.) For ten years prior to 1930 waters from the springs were bottled and sold by a private corporation under a lease from the State. (R. 14.) This lease had 15 years to run when the State purchased the lessee's rights, constructed a modern and efficient bottling works and took over the bottling and sole of the waters. (R. 14.)

The waters bottled and sold consist of three mineral waters and one plain water of high chemical and vegetable purity. (R. 14.) Proceeds from the sales amounted to $104,434.98 for the

fiscal year 1933 and $101,675.80 for the fiscal year 1934. (R. 15.) In addition to the waters sold, large quantities were consumed on the Reservation free of charge at the springs and at various drink pavilions and, upon payment of admission fees, at two drink halls. (R. 15.) The sales of the bottled water were made through distributors and retailers and by direct shipment to consumers. (R. 15.) Advertising amounted to $29,607.98 and $18,392.62 for the fiscal years 1933 and 1934 respectively. (R. 16.)

In the annual report of the Commission and Authority for the fiscal year 1936, the need for promotion of the spa was stressed, and it was asserted that the average of $30,130.23 per year spent during the past five years for this purpose had been wholly inadequate in comparison with expenditures of other institutions in similar fields. (R. 16.) The following is an excerpt from the report (R. 16–17):

> White Rock spends $400,000 a year. French Lick Springs spends on Pluto Water and the hotel $300,000 a year. The Greenbrier, at White Sulphur Springs, West Virginia, spent $44,215 last year, and the Homestead at Virginia Hot Springs, $30,000. One hotel at Hot Springs, Arkansas, The Arlington, spent $20,000 in advertising its baths. The Bernard McFadden "health" hotel at Dansville, N. Y., spent $90,491 last year. Foreign waters

> and products spend similar sums in our own market. Carlsbad products spent $80,285 last year over the radio alone in promoting the salts derived from the Czecho-Slovakian waters, with an additional $4,875 in magazine advertising. Vichy Celestin Water spent $25,000 in New York City alone.
>
> It must be borne in mind that expenditures at Saratoga have been for the Spa and its waters both, in spite of the fact that they are distinct and should be promoted individually; the Spa offering services and waters being a product. * * *

None of the watering places or spas referred to above and located in the United States is owned or operated by the Federal Government or by any state, state commission or authority or political subdivision, and the parties know of none which is so operated. (R. 19.) Several of these privately owned spas have bottled and sold mineral waters to the general public. (R. 19.)

In addition to the foregoing matters it should perhaps be noted that there are many facilities at the Reservation available to the citizens of New York State and the public generally on equal terms. (R. 20.) Fees are charged for admission to the drink halls, bath houses, recreation center and the summer theatre, except for charity treatments administered at the bath houses. (R. 20.) The largest items of income

are the receipts from admissions to the bath houses and from sales of bottled waters, but the largest item of net income is derived from the lease of the property known as the Gideon Putnam Hotel Sanitarium. (R. 21.) The Authority also operates a bus line from the City of Saratoga Springs to certain of the baths and facilities located about two miles south of the downtown section of the City and charges fares for such transportation. (R. 20, 21.) Also located on the Reservation are an administration and research laboratory, and a recreation center with swimming pool, golf course, outdoor gymnasium and other facilities for outdoor recreation. (R. 19–20.)

The District Court found as ultimate facts that in bottling for sale and in selling mineral and table waters the State and its agencies embarked in a business which would normally be taxable, that the activities so conducted by the State and its agencies had the characteristics of a business enterprise and that the waters were sold in competition with private waters. (R. 27.) Accordingly the court concluded that the State and its agencies were not entitled to immunity from federal taxation by virtue of the provisions of the Federal Constitution. (R. 27.) From the judgment in favor of the United States (R. 29) an appeal was taken to the Circuit Court of Appeals for the Second Circuit, which affirmed the judgment (R. 33–37).

SUMMARY OF ARGUMENT

The decisions of this Court from *South Carolina* v. *United States*, 199 U. S. 437, to *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439, establish the principle that a state is not constitutionally immune from federal taxation with respect to activities of a business nature which would otherwise be taxable. This limitation on immunity is a sound one. It represents an accommodation between the right of each state to preserve its government and the power of Congress to levy indirect taxes which shall be uniform. The states are free to engage in enterprises and deal in property of whatever kind, and may promote those activities by local exemptions and subsidies, but may not thereby withdraw sources of national revenue from the power of federal taxation. In addition, the limitation represents a proper allocation of judicial and legislative functions. The judgment whether state activities beyond those which peculiarly belong to the state shall be withdrawn from federal taxation is left to Congress. As a federal legislative problem, it is open to solutions which are not rigid and which take into account relative benefits and burdens, through a legislative process in which the states themselves are represented. Because Congress is a federal legislature, a superficial rule of reciprocal immunity for states and nation would be misconceived, and from the beginning no such

rule has been applied. In many instances, Congress has confirmed the soundness of this view by refraining from taxing states and their instrumentalities to the limit of constitutional power and by waiving the immunity of federal agencies, in whole or part, from state taxation.

The fact that the enterprise here taxed is the sale of property does not render it a function which is constitutionally immune, as the *South Carolina* case, *supra*, demonstrates. Nor is it helpful to describe the activity as a sale of "natural resources". Such a conception is irrelevant to the problem of tax immunity and its proper limits, and the conception would be an impractical one in application. In the present case the resources were acquired by the state only in recent years, and their disposal involves a measure of processing. Thus the present case illustrates the irrelevance and impracticality of a distinction which would in substance be one between extractive industries on the one hand and the furnishing of services or the sale of agricultural and manufactured products on the other.

ARGUMENT

THE BUSINESS OF BOTTLING AND SELLING MINERAL WATERS CARRIED ON BY AGENCIES OF THE STATE OF NEW YORK IS NOT AN ACTIVITY CONSTITUTIONALLY IMMUNE FROM THE APPLICABLE FEDERAL EXCISE TAX

It is unquestioned that the federal excise tax imposed by Section 615 (a) (5) of the Revenue

Act of 1932, *supra*, pp. 2–3, is applicable, as a matter of statutory construction, to the sale by petitioners of the mineral waters which are bottled and sold by them. The sole question is whether the state and its agencies enjoy a constitutional immunity from the tax. The courts below held, without dissent, that under the principles established by the decisions of this Court the constitutional immunity does not extend to activities of the kind in which petitioners are engaged. This conclusion, we submit, is clearly right.

Prior to 1930, the mineral and table waters now bottled for sale and sold by agencies of the State of New York were bottled and sold by a private corporation. In that year, the State purchased the business, constructed a modern bottling works and itself undertook to bottle and sell the waters. No other state has engaged in a comparable activity, similar enterprises being carried on exclusively by private persons. The business involves the continuing use of capital, labor, and management. The processed waters are distributed in the channels of trade throughout the eastern half of the United States with distributors located in many states. The trial court found that the State had "embarked in a business which would normally be taxable" (R. 27). The court also found that the waters "were sold in competition with private waters" and that the undertaking had "the characteristics of a business enterprise" (*ibid.*).

Under the decisions of this Court, early and late, Congress is not precluded by the Constitution from applying to such an activity a general and uniform excise tax. The governing principle was thus stated in *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439, 451: "When a State embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation." While the principle had been suggested previously, it was definitely announced in *South Carolina* v. *United States*, 199 U. S. 437.[1] There the State had established a system of dispensaries for the sale of liquor, which were held liable for federal license taxes imposed on dealers in intoxicating liquors. The State was obviously acting in the interest of the health and morals of its people, and because of the monopolistic feature of the system there was no competition with privately conducted business. Whatever the differences may be between the sale of liquor in that case and the sale of bottled mineral waters in the present case, those differences do not have a constitutional flavor. Indeed, the present case is stronger in that the sale is in competition with similar businesses in New York and in other states, whereas the sale by South Carolina rendered it alone taxable in that State. The *South Carolina* case was

[1] Cf. *United States* v. *Railroad Company*, 17 Wall. 322, 333–335 (dissenting opinion of Justices Clifford and Miller).

followed in *Ohio* v. *Helvering*, 292 U. S. 360, where the distribution system for the sale of intoxicating liquors consisted of stores owned exclusively by a state. In that case, the constitutional question raised by the imposition of the federal excise tax on the sale of liquor was considered so clear that decision was put upon that ground without passing upon the question of the jurisdiction of this Court to entertain the suit.

A similar decision was given in *Helvering* v. *Powers*, 293 U. S. 214, holding that publicly-appointed trustees operating a street railway on behalf of the state were subject to federal income tax because the nature of the activity lay outside the scope of constitutional immunity. And in *Allen* v. *Regents, supra*, the Court held that the State of Georgia was not entitled to immunity from a penalty asserted for failure to collect the federal admissions tax on admissions paid at athletic contests held by state-owned universities, even though the activities were deemed by the local authorities to be an "integral part of the program of public education conducted by Georgia" (p. 449). On the same day that the *Regents* case was decided, this Court was able to state that the "judicial pronouncements marking the boundaries of state immunity * * * definitely establish[ed]" as a guiding principle of limitation that there is excluded from the immunity "activities not thought to be essential to the pres-

ervation of state governments even though the tax be collected from the state treasury." *Helvering* v. *Gerhardt*, 304 U. S. 405, 419.

It is submitted that the limitation thus described and repeatedly applied is a sound one. Its validity rests mainly on two important grounds. First, it is a practical and proper accommodation between the express power of Congress to levy indirect taxes which shall be uniform and the implied right of each state to preserve the existence of its government. Secondly, it represents a sound allocation of functions between the judiciary and the legislature in marking the boundaries of tax immunity of the states. We turn to these considerations.

The application of the doctrine of immunity "must be practical" (*Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508, 516), particularly where, as here, the immunity is an implied one and must be harmonized with the express grant to Congress of the taxing power. Enlargement of state immunity means diminution of the national taxing power and national sources of revenue. The immunity must therefore be limited to the necessity which gave rise to its implication. It was this practical judgment which undoubtedly lay at the basis of the decision in the *South Carolina* case, *supra*. See *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173. The problem, and its resolution, were thus put in *Helvering* v. *Gerhardt*, *supra*, at 417:

> * * * But if every federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation. See *South Carolina* v. *United States*, 199 U. S. 437, 454–455.

The distinction between "strictly governmental" and "proprietary" functions, stemming from the *South Carolina* case, and subsequently phrased in various ways, is simply an effort to describe the balance reached between the claims of the national government for revenue and those of the states for preservation. If the terms used tend to connote a judgment on the wisdom or worthiness of particular undertakings by the states, the terms are indeed unfortunate. But when used in their present context, they mean only that state activities, however appropriate in a period when local governments are impelled to undertake important additional responsibilities, are not constitutionally immune from taxation if they are outside the very limited class of functions which are peculiarly and indispensably carried on by the states. Perhaps the scope of

"strictly governmental" for purposes of tax immunity may be paraphrased in the language of an Australian judge applying the limitation: "* * * the function is not strictly governmental in the sense of being a function essential to all government, a function like the legislative, executive and judicial functions, without which a civilized state cannot be conceived, a function with which the state cannot part." Higgins, J., in *Amalgamated Society of Engineers* v. *Adelaide Steamship Company, Ltd.*, 28 C. L. R. 129, 170.

The limitation of immunity is also, as stated above, a sound allocation of judicial and legislative functions. Precisely because the wisdom of extending the field of state activities is a question for the state legislature, no relevance attaches to that judgment in marking the limits of tax immunity once the narrow field of indispensable state functions has been passed. Constitutional immunity from taxation is not a privilege conferred to encourage or to subsidize enterprises undertaken by the state. Such encouragement and subsidy are a proper subject of state legislation, whether by conferring local tax exemption or by other favored treatment. The Federal Constitution places no bar upon the states in that regard. *Puget Sound Power and Light Co.* v. *Seattle*, 291 U. S. 619. But it will not be suggested that it is for the state legislature to determine whether an activity of the state is to be immune from federal taxation.

That decision rests with Congress and with this Court.

In this aspect, the alternatives are either to increase the area in which by judicial decision state activities are permanently and irremediably withdrawn from federal taxation, or to leave the largest possible scope for that determination to be made by Congress, with that opportunity for change, for consideration of benefits and burdens, and for constructive solutions, which is characteristic of the legislative process. Thus viewed, the limitation laid down in the *South Carolina* case has special merit. This factor, too, was pointed out in the *Gerkardt* case, *supra,* at 416:

> * * * the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other.

It is because Congress is a federal legislature that, as was appreciated by Chief Justice Mar-

shall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 435–436, problems of intergovernmental tax immunity cannot be solved by a superficial rule of reciprocity.[2] It is not to be expected that individual states will waive claims to immunity in the interest of the national revenue; Congress, on the other hand, can be expected to, and does frequently, waive the immunity of federal agencies. By the same token, the states are without

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[2] Compare Bradley, J., dissenting, in *Collector* v. *Day*, 11 Wall. 113, 128–129:

"* * * The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation. * * * I cannot but regard it [the decision] as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled."

Mr. Justice Frankfurter, concurring, in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 489, stated:

"* * * The seductive *cliché* that the powers to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative—because the existence of the national government implies immunities from state taxation, the existence of state governments implies equivalent immunities from federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent, the force of which gathered rather than lost strength with time. *Collector* v. *Day*, 11 Wall. 113, 128."

power to confer immunity upon their own activities beyond that which would otherwise be implied from the Constitution; while Congress may declare an immunity which might not be held to exist in the silence of Congress. See *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Federal Land Bank of St. Paul* v. *Bismark Lumber Co.*, 314 U. S. 95. It is signficant that at the time when this Court removed the salaries of government employees from the sphere of immunity, the Court took occasion to state: "That the two types of immunity [state and national] may not, in all respects, stand on a parity has been recognized from the beginning, *McCulloch* v. *Maryland, supra,* 435–436; and possible differences in application, deriving from differences in the source, nature and extent of the immunity of the governments and their agencies, were pointed out and discussed by this Court in detail during the last term. *Helvering* v. *Gerhardt, supra,* 412–413, 416." *Graves* v. *New York ex rel O'Keefe,* 306 U. S. 466, 478.

There are numerous instances in which Congress has in fact refrained from taxing the states and their instrumentalities, and has waived the immunity of federal agencies, wholly or partly, from state taxation. The federal income tax law does not apply to states and their agencies, and no effort is made to tax whatever income accruing to them may be constitutionally reached. See G. C. M. 14407, XIV–1 Cum. Bull. 103.

The local taxation of national banks under congressional permission, is well known (R. S. 5219). When the National Government took over the operation of the railroads during the last war, provision was made for the continuance of state taxation. 40 Stat. 451, 458. A recent governmental study enumerates 23 statutes authorizing the imposition of taxes on federally-owned real estate in the same manner and to the same extent as on privately-owned property; 17 statutes authorizing contributions from the revenues of federal agencies to states and counties based on a percentage of receipts; 7 statutes authorizing such contributions to be made by agreement or other arrangement; and 36 bills relating to the taxation of federal real estate introduced in the 77th Congress alone. House Document 216, 78th Cong., 1st sess. (*Federal Contributions to States and Local Governmental Units with respect to Federally Owned Real Estate*). Not merely the number of such statutes, but the factors entering into the legislative judgment, are significant.[3]

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[3] For example, in authorizing agreements for payments to local authorities in lieu of taxes on federal slum-clearing and low-cost housing projects, Congress provided: "Such sums shall be fixed in such agreement and shall be based upon the cost of public or municipal services to be supplied for the benefit of such project or the persons residing on or occupying such premises, but taking into consideration the benefits to be derived by such State or subdivision from such projects." 49 Stat. 2026.

The experience with respect to the Tennessee Valley Authority is also illuminating. David E. Lilienthal, *TVA:*

To obtain tax immunity for commercial undertakings, no less than to obtain authority to tax nationally owned property or activities, the appropriate course for the states is through "peti-

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Democracy on the March (1944) 159, describing the amendment of the statute in 1940, states:

> TVA made an exhaustive analysis of the facts respecting local tax problems as a result of TVA property purchases, the prospects for the future, the benefits received by the region from federal funds. The details of the varying tax laws of several different states were analyzed closely. Then TVA representatives conferred with the governors and fiscal officers of all the states, of many counties with peculiarly difficult problems, with tax consultants, and with federal tax officials. As a result a measure was drafted which embodied principles that TVA as a national agency could recommend. And, although far short of the original claims of local tax bodies, its fairness led all the states to concur. After exhaustive Congressional committee hearings, the bill as recommended by the TVA and agreed to by the states was passed. Under this law TVA has paid, to the end of the fiscal year 1943, out of its power revenues, a total of $5,320,000 in tax payments to states and counties of the valley; in the single fiscal year ended June 30, 1943, the total of these payments was about two million dollars.

See also Durisch and Macon, *Payments in Lieu of Taxes by the Tennessee Valley Authority*, 3 Journal of Politics 318; Edelman, *Public Ownership and Tax Replacement by the TVA*, 35 Am. Pol. Sci. Rev. 727; Prichett, *The Tennessee Valley Authority* (1943) 111–115; Ransmeier, *The Tennessee Valley Authority* (1942) 72–76.

The presence or absence of what may be called this "inner check" on legislative action is important also in such fields as the protection of minorities and the taxation by the states of interstate commerce. Cf. *South Carolina Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U. S. 177, 185, n. 2; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 45, n. 2.

tion to the Federal Congress, which also is their Congress." *United States and Mesta Machine Co.* v. *County of Allegheny*, 322 U. S. 174, 191.*

It is, of course, not a doctrine peculiar to taxation that the immunity of states is not perfectly symmetrical with the immunity of the National Government. Congress may provide for the priority of debts due to the United States, even as against claims of the state. *United States* v. *Fisher*, 2 Cranch 358, 397. Congress may tax imports of a state acquired for governmental purposes, *Board of Trustees of the University of Illinois* v. *United States*, 289 U. S. 48, but the states may not levy an inspection fee upon goods brought into the state by the Federal Government, *Mayo* v. *United States*, 319 U. S. 441. The National Government may condemn state-owned land, *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 534, but the states may not condemn federally owned land without the consent of Congress, *Minnesota* v. *United States*, 305 U. S. 382, 387.

It is contended, however, that in the present case there is immunity because "it is the essence of sovereignty for a state to be able to dispose of its property" (Brief for the State, p. 12).

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* Cf. Ernst Freund, *Standards of American Legislation* (1917) 281: "If the doctrine of reciprocal exemption sounds plausible in logic, in practice it works inequitable and sometimes intolerable results. It furnishes another illustration of a judicial doctrine that for constructive legislative purposes ought to be rejected."

Petitioners recognize that for purposes of this case their contention must apply to "such property, whether originally owned or acquired with time" (*ibid.*), since it was not until recent years that the source of the mineral waters came into state ownership. But this contention would in substance overrule the *South Carolina* case and the *Ohio* case, *supra*, which involved the sale of liquors owned by the state and distributed in the performance of its public responsibilities. The contention would, moreover, draw an irrelevant distinction between the sale of property on the one hand and the sale of services on the other, such as the furnishing of transportation involved in the *Powers* case. Petitioners' contention may perhaps be limited to the sale of what are deemed by them to be "natural resources". As a criterion critical for constitutional purposes, this is highly indefinite. Thus the state itself at one point observes that "The number of natural resources is not large" (p. 14), and at another point asserts: "Land, water, oil, coal, gold, gravel in river beds, are but a few of the natural resources that the states have sold" (p. 12). The suggested classification might draw an anomalous constitutional line between the extractive industries and agricultural or manufacturing enterprises; it would presumably require, also, the drawing of distinctions dependent on the degree of processing to which the "resources" are subjected prior to sale.

The states have plenary power to acquire and dispose of all types of raw materials and other property. Cf. *Jones* v. *Portland*, 245 U. S. 217; *Green* v. *Frazier*, 253 U. S. 233. To introduce a legal concept of natural resources to enlarge the sphere of tax immunity would be, aside from its impracticality, irrelevant, uncalled for from the standpoint of protecting state functions, and unsound from the standpoint of maintaining the available sources of federal revenues.

Apparently recognizing that the suggested criterion is vulnerable, the state finally narrows its contention to apply solely to the sale of natural resources in connection with a "larger program". It says that "to grant immunity in the case at bar does not necessarily require immunity when a state engages in a wholesale disposition of its natural resources, unrelated to any particular program" (p. 16). Once again, it must be recalled that it is not for the federal courts to decide whether commercial selling enterprises engaged in by a state have greater or less claim to immunity because of their asserted relation or lack of relation to a larger public program. It should also be remarked that, so far as the other activities of the state at Saratoga Springs are concerned, some of them would admittedly be taxable (Pet. 16), and the relation to them of the sale of bottled waters throughout the eastern states is simply the providing of additional funds. The decision in *Allen* v. *Regents*, as well as in the South Carolina case, deci-

sively rejected the argument that the provision of funds for any state purpose through a commercial enterprise is a basis for tax immunity. This proposition answers, likewise, the use made by petitioners (Brief for State, pp. 9, 12–13) of the opinions in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279; and *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, the first of which has been overruled and the other two of which held the income in question taxable. The opinion in the first case stressed the governmental character, not of the lease of oil lands by the State, but of the use of the royalties for school purposes (285 U. S. at 398, 400), an analysis rejected in the later *Regents* case. The language relied on in the second case was, of course, dictum, and in the third case only a form of stating the question, and in neither could the opinion have meant to sanction the withdrawal from federal taxation of the sale of property by virtue of its acquisition and disposal by the state in lieu of private ownership and distribution.

As stated above, the Constitution gives full scope to the States and their subdivisions to expand and foster public enterprises in accordance with local policies and by many means, but not, unless Congress so provides, at the expense of the general, non-discriminatory taxing power of the national government, upon whose sources of revenue the general welfare is dependent.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted.

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